

**LICENCE APPEAL
TRIBUNAL**

**Safety, Licensing Appeals and
Standards Tribunals Ontario**

**TRIBUNAL D'APPEL EN MATIÈRE
DE PERMIS**

**Tribunaux de la sécurité, des appels en
matière de permis et des normes Ontario**



Tribunal File Number: 18-009277/AABS

In the matter of an Application pursuant to subsection 280(2) of the *Insurance Act*, RSO 1990, c I.8, in relation to statutory accident benefits.

Between:

J.L.Z.

Applicant

and

Unifund Assurance Company

Respondent

DECISION

PANEL: Jesse A. Boyce

APPEARANCES:

For the Applicant: Yu Jiang, Counsel

For the Respondent: Roman J. Myndiuk, Counsel

HEARD: In Writing on: May 28, 2019

OVERVIEW

- [1] The applicant, J.L.Z., was injured as a passenger in an automobile accident on November 7, 2015 and sought benefits from the respondent, Unifund Assurance Company, pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*¹ (the “*Schedule*”). As a result of the accident, J.L.Z. alleges he sustained physical injuries to his neck, shoulders, back and pelvis as well as psychological impairments classified as phobia, anxiety and stress.
- [2] J.L.Z. applied for medical and rehabilitation benefits as well as a non-earner benefit (“NEB”) that were denied by Unifund because it determined J.L.Z.’s injuries were predominately minor and therefore subject to the Minor Injury Guideline (“MIG”). J.L.Z. disagreed and applied to the Licence Appeal Tribunal – Automobile Accident Benefits Service for resolution of the dispute. The parties participated in a case conference but were unable to resolve the issues in dispute and, thus, proceeded to this written hearing.

ISSUES TO BE DECIDED

- [3] The following are the issues to be decided, as per the Case Conference Order dated February 15, 2019:
 - i. Did the applicant sustain predominantly minor injuries as defined under the *Schedule*?
 - ii. Is the applicant entitled to a non-earner benefit in the amount of \$185.00 per week from September 28, 2016 to date and ongoing?
 - iii. Is the applicant entitled to a medical benefit in the amount of \$2,819.08 for chiropractic treatment recommended by Perfect Physiotherapy and Rehabilitation Centre in a treatment plan (OCF-18) submitted on August 25, 2016, and denied on December 16, 2016?
 - iv. Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

- [4] J.L.Z. sustained minor physical injuries because of the accident which are treatable within the MIG. I find he has not demonstrated, on a balance of

¹ O. Reg. 34/10.

probabilities, that he sustained psychological impairments or chronic pain as a result of the accident that would remove him from the confines of the MIG.

- [5] Accordingly, J.L.Z. is not entitled to payment for the chiropractic treatment as it is not reasonable and necessary. J.L.Z. is not entitled to a NEB as he does not suffer from a complete inability to carry on a normal life.

ANALYSIS

Applicability of the Minor Injury Guideline

- [6] I find the medical evidence indicates that J.L.Z. suffered predominately minor physical injuries as a result of the accident.
- [7] The MIG establishes a framework for the treatment of minor injuries, as defined in s. 3(1) of the *Schedule*. Section 18(1) limits recovery for medical and rehabilitation benefits for predominantly minor injuries to \$3,500. Applying *Scarlett v. Belair Insurance*,² the applicant must establish entitlement to coverage beyond the \$3,500 cap on a balance of probabilities.
- [8] In an OCF-3 dated June 23, 2016, J.L.Z. is noted to have decreased range of motion in his lumbar, thoracic and cervical spine as well as chronic pain. As a result of this assessment, it was determined he had a complete inability to carry on a normal life. A reassessment in August 2016 added dizziness, headaches, a sleep disorder and anxiety to his impairments and a recommendation he be treated outside of the MIG.
- [9] The physical injuries documented in the weeks and months after the accident fall within the definition of minor injury, as they are listed as headaches, range of motion and sprain and strain-type injuries. In submissions, J.L.Z. concedes that his physical impairments meet this definition. I find that these injuries, considered alone, fall squarely within the definition of “minor injuries” under the *Schedule* and agree with Unifund that these injuries should be treated within the MIG.
- [10] However, the basis for J.L.Z.’s application and the parties’ dispute is his belief that because of the accident he sustained psychological impairments and chronic pain that remove him from the MIG limits.

² 2015 ONSC 3635

Psychological Impairments and Chronic Pain

- [11] I find that J.L.Z. has not shown, on a balance of probabilities, that he sustained psychological impairments and chronic pain as a result of the accident that require access to treatment beyond the limits of the MIG.
- [12] In support of his position, J.L.Z. relies on the opinions of Dr. Palantzas and Dr. Tavares, chiropractors, who both opined that he is suffering from depression and anxiety as a result of the accident. In response, Unifund relies on the Insurer's Examination ("IE") Report of Dr. Clewes, psychologist, which found that J.L.Z. did not suffer from any significant psychological symptoms as a result of the accident. Dr. Clewes did not make a psychological diagnosis and wrote that J.L.Z. did not meet the criteria for a mood or anxiety disorder under DSM-IV. Unifund submits that there is no continuous evidence of psychological complaints in the clinical notes and records of J.L.Z.'s treating practitioners or family physician to corroborate the alleged psychological impairments and no diagnosis of same from a qualified practitioner.
- [13] I agree. First, Dr. Palantzas and Dr. Tavares are both chiropractors, so I afford their opinions that J.L.Z suffers from psychological impairments in the OCF-3 and OCF-18, respectively, no weight. Second, the records of J.L.Z.'s family physician, Dr. Dong, make no mention of the accident and are silent on any psychological complaints. Further, the notes of July 24, 2016 indicate no sleep issues, depressed mood or lack of interest. There is again no mention of psychological or mental health concerns in either of the next two visits, on June 18, 2017 or September 1, 2018. On the evidence, I fail to see the basis for J.L.Z.'s belief that he suffers from a psychological impairment as a result of the accident that requires treatment beyond the MIG.
- [14] In support of his position that he suffers from chronic pain, J.L.Z. relies again on the OCF-3 and the OCF-18 recommending chiropractic treatment as well as the notes of Dr. Dong. In response, Unifund argues that J.L.Z. has not provided any medical opinion that he suffered impairments that are now chronic in nature nor has he provided any treating records or assessments indicating same. I agree with Unifund that J.L.Z. has not provided evidence to meet his burden.
- [15] First, I assign limited weight to the opinions of the chiropractors in the OCF's, as they do not actually diagnose chronic pain, but refer to "chronic injuries" and recommend a battery of treatment on this basis which, in my view, is not proportional to the evidence and, in any event, not in line with J.L.Z.'s own admission that his impairments are sprain and strain-type injuries. In the same form, Dr. Palantzas also indicates that J.L.Z. suffered a complete inability to

carry on a normal life. I find this determination undermines the credibility and reasonableness of the OCFs because on the facts and evidence, and as discussed below in the NEB section, these opinions are not defensible on the medical evidence provided.

- [16] Second, while the notes of Dr. Dong do begin to refer to “neck muscle tension” J.L.Z. was experiencing two to three times a week in June 2017 and then again in September 2018, Dr. Dong chalks this pain up to the fact that J.L.Z. works in IT and sits at a desk all day, not to the accident, a fact which J.L.Z. does not address in his submissions. In 2017, Dr. Dong notes full range of motion and some stiffness but ultimately recommends adjusting his computer monitor, proper ergonomics and stretching. In the 2018 note, while there is a complaint of pain and stiffness is noted, it is again chalked up to sitting all day, not to the accident, and J.L.Z. does not indicate how this pain is caused by the accident. Dr. Dong notes that the pain has no impact on J.L.Z.’s daily activities or function, as he continued to attend school and work part-time. As J.L.Z.’s reporting of pain is not continuous, and he is not experiencing any functional limitations as a result of his pain, I find there is no basis to remove J.L.Z. from the MIG due to alleged chronic pain.
- [17] As a result, I find that J.L.Z. has not demonstrated, on a balance of probabilities, that he suffers from an impairment that justifies treatment beyond the limits of the MIG.

Is the treatment plan for \$2,819.08 reasonable and necessary?

- [18] Having determined that J.L.Z.’s impairments are properly within the MIG, it is my understanding that the MIG limits have been exhausted. Despite this, I find the medical benefit in the amount of \$2,819.08 for chiropractic treatment recommended by Perfect Physiotherapy and Rehabilitation Centre is not reasonable and necessary.
- [19] First, J.L.Z. self-reported to Dr. Crewes in September 2016 that “he stopped treatment because he no longer felt he was bothered by any pain symptoms.” Second, the treatment J.L.Z. did incur in 2016 that was apparently beneficial was for weekly massage therapy, which is not included in the treatment plan proposed. Third, while I agree with J.L.Z. that pain reduction is a legitimate goal for treatment, I find on the evidence that J.L.Z. has failed to establish the connection between his pain complaints and the injuries from the accident and that in any event, he has no functional limitation in his day to day activities or schooling. Fourth, other than the OCF-18, J.L.Z. has not provided objective

evidence that facility-based chiropractic and physiotherapy treatment is even appropriate to treat his relatively minor reports of pain two years post-accident.

[20] For these reasons, I find J.L.Z. is not entitled to the treatment plan in dispute.

Non-Earner Benefit

[21] In order to receive a NEB, J.L.Z. must prove that he suffers a complete inability to carry on a normal life.³ A person suffers a complete inability to carry on a normal life as a result of an accident if the person sustains an impairment that continuously prevents the person from engaging in substantially all of the activities in which the person ordinarily engaged before the accident.⁴ I find on the evidence that J.L.Z. is not entitled to a NEB for the period in dispute.

[22] J.L.Z. submits that he suffers from a complete inability to carry on a normal life on the basis that he has a psychological impairment and chronic pain as a result of the impairments he suffered in the accident and again relies on the OCF-3. I find that the evidence does not support this position.

[23] Unifund conducted IE's to determine J.L.Z.'s entitlement to a NEB, resulting in reports from Dr. Urovitz, orthopaedic surgeon, Dr. Clewes, psychologist and Dr. Belfon, general practitioner. The claim for a NEB was denied on the basis of these reports, which all found that he does not suffer a complete inability to carry on a normal life as a result of the accident. On review of the reports, I agree. I find that there is no evidence J.L.Z. suffers from a complete inability to carry on a normal life because his pain is not debilitating, he is independent in his routines and self-care, continues to complete housework and his daily activities have actually increased. Indeed, after the accident, he was able to graduate on time from high school and began attending university in the fall, which he continues to do, in addition to participating in a work placement. In my view, I find this to be compelling evidence that his alleged impairments do not render him completely unable to perform his activities of daily living or pursue his interests.

[24] Where pain is a primary factor, it must be considered whether performing the activity with pain is such that the individual is practically prevented from engaging in those activities.⁵ On review of the medical evidence, while J.L.Z. may have reported pain, his pain is clearly manageable and does not practically

³ The factors that inform the determination of NEB entitlement are outlined in the seminal case *Heath v. Economical Mutual Insurance Company*, 2009 ONCA 391 (CanLII).

⁴ O. Reg. 34/10, at s. 3(7)(a).

⁵ *Heath*, at para 50.

prevent him from independent self-care or engagement in other activities like his schooling or completing an entire work day while sitting at his desk.

[25] *Heath* also requires an assessment of the applicant's pre-accident activities and life circumstances over a reasonable period of time prior to the accident. However, there was no evidence led or submissions on J.L.Z.'s pre-accident activities and how his impairments as a result of the accident have led to a complete inability to carry on with them post-accident. Similarly, he made no submissions on the amount of time he spent on each of his pre-accident activities or on how much value and importance he placed on each. In the absence of this information, it is difficult to compare his pre and post-accident capabilities with respect to the activities he ordinarily engaged in or valued.

[26] Further, while not required, J.L.Z. did not rely on any affidavit or *viva voce* evidence to speak to these *Heath* factors. As a result, like the IE assessors, I have no evidence to base J.L.Z.'s claims on and certainly not enough to overcome the difficult test to warrant entitlement to a NEB. I only have bald assertions that he has a complete inability to carry on a normal life with no evidentiary support. On this basis, I find that J.L.Z. is not entitled to a NEB for the period in dispute.

CONCLUSION

[27] For the reasons outlined above, I find that:

- i. J.L.Z. sustained predominately minor physical injuries because of the accident which are treatable within the MIG. Further, I find he has not demonstrated, on a balance of probabilities, that he sustained psychological impairments or chronic pain as a result of the accident that would remove him from the confines of the MIG.
- ii. J.L.Z. is not entitled to payment for the chiropractic treatment as it is not reasonable and necessary.
- iii. J.L.Z. is not entitled to a NEB as he does not suffer from a complete inability to carry on a normal life.

iv. As no benefits are overdue, no interest is payable.

Released: September 13, 2019



Jesse A. Boyce
Adjudicator